



National PROPANE GAS Association

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Dockets Unit (DHM-30)  
Office of Hazardous Materials Safety  
Research & Special Programs Administration  
US Department of Transportation  
400 Seventh St., SW  
Washington, D.C. 20590-0001

Subject: ***Applicability of the Hazardous Materials Regulations to Loading, Unloading and Storage -- Docket No. HM-223; Notice No. 96-15 (RIN 2137-AC68)***

Dear Sir/Madam:

The National Propane Gas Association submits the enclosed comments in response to the Advance Notice of Proposed Rulemaking (ANPRM) published under the subject Notice in the July 29, 1996 ***Federal Register***.

NPGA is the national trade association of the LP-gas (principally propane) industry with a membership of about 3,500 companies, including 37 affiliated state and regional associations, representing members in all 50 states. Although the single largest group of NPGA members are retail marketers of propane gas, the membership also includes propane producers, transporters and wholesalers, as well as manufacturers and distributors of associated equipment, containers and appliances. Propane gas is used in over 18 million installations nationwide for home and commercial heating and cooking, in agriculture, in industrial processing, and as a clean air alternative engine fuel for both over-the-road vehicles and industrial lift trucks.

There is presently a Preemption Determination open before RSPA/OHMS [PD-8(R), PD-9(R), PD-10(R) and PD-11(R)] regarding California regulations affecting track storage of chlorine tank cars. Following publication by DOT of an initial determination in this proceeding, The Chlorine Institute, NPGA and several other associations filed statements challenging various aspects of the preliminary ruling. In response to those statements, DOT opened HM-223 to consider questions regarding definition of "loading", "unloading", and "in-transit storage", all of which are issues in the referenced Preemption Determination. Subsequently, DOT deferred action on the challenges to the Preemption Determination, pending consideration of comments received in response to HM-223; Notice No. 96-15.

As a public service, the Chemical Manufacturers Association has acted as a coordinator for an informal alliance of a number of trade associations to submit a statement to DOT regarding the subject rulemaking, addressing several issues of mutual concern among the members of the alliance. NPGA is a member of the alliance, and generally speaking, supports the comments on HM-223; Notice No. 96-15 submitted on behalf of the alliance. However, in order to fully represent the views of our members, there are a few instances in the following comments where the NPGA differs slightly with the comments submitted by the alliance.

### ***General***

DOT has primary responsibility and statutory authority for transportation of hazardous materials and safety matters directly related to such transportation. At the same time, the Occupational Health and Safety Administration and the Environmental Protection Agency, as well as local fire authorities and state regulatory agencies, also have an interest in various aspects of the manufacturing/production operations and shipment preparation and storage in preparation for transportation. Without careful coordination at the manufacturing/transportation interface between DOT's regulations and these other respective regulations, there could be duplication of regulations, or even significant conflicts, which could only be resolved through preemption by DOT.

Industry and regulatory agencies alike are very much concerned that such situations be minimized, even prevented, if at all possible. The mutual goal is to create a system of efficient and effective regulations and compliance practices that provide safe use and transportation of the hazardous materials.

NPGA believes that transportation effectively begins at the plant gate or property line. Further, the Hazardous Materials Regulations should not extend into the facility for loading purposes unless relevant requirements pertain to safety issues directly related to transportation, including proper container specification, filling requirements, marking and the shipper general duty responsibilities presently covered by the Regulations.

Likewise, these same Regulations should only extend into the destination facility for unloading or return shipment purposes directly related to safety in transportation.

### ***Questions Presented by DOT in the ANPRM***

The following questions were published by DOT in HM-223; Notice No. 96-15 in the July 29, 1996 ***Federal Register***. For purposes of identification, these questions are shown below ***printed in italics***. The related NPGA comments are identified as "**Comment:**" and are shown in plain type.

### **Loading**

***1. At what point is a package offered for 'transportation in commerce'? When filled? when a package is selected from inventory? when an offer (oral or written) has been made to a carrier? When a shipping paper has been executed? When the packaging is physically tendered to the carrier? At some other point? Explain your answer.***

**Comment:** Within the scope of the Hazardous Materials Regulations, there are two basic ways propane is transported in commerce -- (1) for non-bulk package shipments, DOT cylinders, and (2) for bulk package shipments, DOT specification tank cars for rail shipments and DOT specification cargo tank motor vehicles for highway shipments.

The propane sold at retail in the United States is for use as a heating fuel. Propane heating fuel in DOT cylinders is almost entirely transported by private motor carrier, possibly a little by motor common carrier, and very little, if any, by rail. Propane heating fuel in bulk is transported from the point of production/manufacture primarily by pipeline and then to the local distribution facility by private or common motor carrier and to a significantly less degree by rail tank car. Propane is transported to the end consumer exclusively by private motor carrier.

Bulk Packagings - From a legal standpoint, carrier custody for the shipment begins when a duly authorized carrier representative (regardless of whether a motor common carrier or a rail carrier) accepts the shipment, as the carrier is now responsible for exercising due care and caution to protect the package. For common motor or rail carriers, then, the point of acceptance/custody transfer provides an easy definition for the point where transportation begins. Up to the point of acceptance, the shipper is responsible for taking responsible care of the package.

There is no parallel with private motor carriers to this point of custody transfer as they do not relinquish custody of the lading for the purposes of transportation. Since a private carrier is performing both the shipper and carrier functions, then the most logical point for such a private carrier shipment to enter transportation is the act of physically crossing the property line and entering a public way.

Cylinders - The nature of the propane industry is such that when a cylinder is filled at a bulk plant, the cylinder is effectively ready for shipment then and there -- empty, company-owned cylinders are turned around rather quickly and are not filled and held pending receipt of an order; that is, filled cylinders are not warehoused in inventory. If a privately owned cylinder is brought in for filling by its owner and the same cylinder is transported by the owner away from the bulk plant, it is believed that particular operation is not within the scope of the DOT Hazardous Materials Regulations.

Cylinders in inventory, even though loaded on a truck, are not in transportation as they are still physically on private property and thus may be considered to not be in transportation; the regulation of such cylinder then would be under state and local regulation, if any.

Bulk Packages and Cylinders - OSHA regulations apply because the bulk plant is a workplace. EPA/JRMP applies only to stationary sources and thus would appear to exclude transportation containers. If DOT does not have jurisdiction, then state and local fire and building codes would seem to have jurisdiction over storage conditions and related requirements. Even though DOT would not have jurisdiction over the storage or even the **loading/unloading** operations, we believe DOT does have jurisdiction over how much lading a package may contain, package requalification requirements, construction requirements of the cargo container, blocking and bracing of non-bulk packages, and so on -- those factors that have a direct effect on transportation.

Question 1 appears to be directed at operations of common carriers, in contrast to Question 2, which is clearly directed at private carriers.

Consequently, NPGA's responses to the specific questions are as follows:

***At what point is a package offered for 'transportation in commerce'?*** That really depends upon whether the carrier involved is a private motor carrier or a common motor or rail carrier because of the provisions of transportation law. Thus, there is not a straight forward answer to the question. The foregoing discussion outlines these differences.

***When filled?*** Private motor carrier - No; Common motor or rail carrier - No.

***when a package is selected from inventory?*** Private motor carrier - No; Common motor or rail carrier - No.

***When an offer (oral or written) has been made to a carrier?*** Private motor carrier - not applicable; Common motor or rail carrier - No.

***When a shipping paper has been executed?*** Private motor carrier - No; Common motor or rail carrier - No.

***When the packaging is physically tendered to the carrier?*** Private motor carrier - not applicable; Common motor or rail carrier - yes.

**At some other point?** Private motor carrier - when the transportation vehicle enters or leaves public roads; Common motor or rail carrier - when the carrier representative accepts the shipment..

**2. (a) If the shipper is a private carrier, should any portion of transportation, prior to movement onto a public road, be considered transportation in commerce?**

**Comment:** This question appears to be directed at carriage by motor vehicle [the reference to "public road"], which is where essentially all private carriage occurs. For private carriers, transportation begins when the vehicle enters public roads and ends when the vehicle leaves public roads. However, we also recognize that certain operations that occur "upstream" of this event are properly subject to DOT regulation -- package selection, requalification, filling limits and marking are among the ancillary activities that have a direct bearing on safe transportation.

**(b) If the carrier is a contract or common carrier, should any movement on the shipper's facility of a transport vehicle containing a hazardous material be considered in transportation in commerce, including movement to an on-site storage facility?**

**Comment:** As with private carriers, transportation should start when the vehicle enters public roads or carrier tracks, notwithstanding the acceptance of custody by the driver or railroad representative signing the shipping papers, thus accepting the shipment.

**(c) Should public accessibility to the shipper's facility have any bearing on whether in-plant movement is regulated?**

**Comment:** No!

**3. (a) Should the agency continue to regulate the loading of cargo tanks but not other bulk packagings (except where a function relates directly to safety in transportation away from the loading facility) ?**

**Comment:** Even though DOT would not have jurisdiction over the storage or even the loading/unloading operations, DOT could have jurisdiction over how much lading a container may have, requalification requirements, construction requirements of the container, blocking and bracing of non-bulk packages, and so on.

**(b) Should regulation be limited to loading of cargo tanks or other bulkpackaging only where contract or common carrier personnel are involved in the loading?**

**Comment:** The agency should regulate the loading of bulk packagings only to the extent that such operations relate to safety in transportation, whether the vehicle is moving by private or common carrier.

**4. (a) Should the agency regulate the filling of non-bulk packagings beyond functions that directly relate to safety during transportation away from the filling facility?**

**Comment:** No! At least with respect to LP-gas, these concerns are already addressed by existing state regulations; consequently, DOT preemption would not serve a useful purpose.

**(b) Should regulation be limited to the loading or filling of bulk or non-bulk packagings performed by contract or common carrier personnel only?**

**Comment:** No. See answer to Question 3(b), above.

**5. Are there other factors for determining whether loading of hazardous materials is "incidental " to transportation in commerce?**

**Comment:** Other than safety, no.

### Unloading

1. *(a) Should RSPA continue to regulate rail tank car unloading by consignee?*

**Comment:** No, except to the extent that unloaded cars must be properly prepared for return transportation consistent with safety concerns.

*(b) Should RSPA continue to regulate rail tank car unloading by consignee in light of OSHA's comprehensive worker safety and health standards?*

**Comment:** No, except to the extent that unloaded cars must be properly prepared for return transportation consistent with safety concerns.

*(c) Should RSPA or FRA promulgate regulations for the protection of railroad workers while performing work assignments within plant boundaries?*

**Comment:** No comment -- this is a question directed at rail carriers and is beyond our scope of interest.

*(d) If RSPA continues to regulate rail tank car unloading by consignee, should RSPA only regulate to the extent that the unloading process is begun or, alternatively, completed, within a specified period of time (e.g., within two weeks of delivery to the consignee)? If so, what timeframe do you recommend?*

**Comment:** No, except to the extent that unloaded cars must be properly prepared for transportation consistent with safety concerns. Such time periods are arbitrary by their very nature and are beyond DOT's scope and jurisdiction. As long as a hazardous materials is in a DOT specification tank car, or a cargo tank motor vehicle, for that matter, that lading is still subject to the Hazardous Materials Regulations.

2. *Should RSPA regulate unloading for other than tank cars, of non-bulk or bulk packages when unloading does not involve a contract or common carrier?*

**Comment:** No, covered by OSHA and state regulations.

3. *Should public accessibility to a consignee's facility have any bearing on whether unloading is regulated?*

**Comment:** Such unloading should have no bearing.

4. *Since a private motor carrier may be both a carrier and consignee, at what point should transportation be considered complete for that carrier? (e.g., When a transport vehicle is delivered to the carrier's facility? When it is unloaded?)*

**Comment:** Transportation is complete for a private carrier when the transportation crosses the property line entering the shipment destination.

5. *Are there other factors for determining whether unloading of hazardous materials is "incidental" to transportation in commerce?*

**Comment:** No, other than factors related to the return of an unloaded tank car.

### Storage

1. *Should the storage of hazardous material on leased track, by any person, be regulated under the HMR? Why or why not?*

**Comment:** For the purposes of this rulemaking, leased track is equivalent to privately-owned track and should be subject to the same regulations.

**2. Should the HMR continue to apply only to storage that may occur between the time a hazardous materials shipment is offered for transportation to a common, contract or private carrier and the time the shipment reaches its intended destination and is accepted by the consignee?**

**Comment:** No, the regulations should only apply to those shipments that have actually entered transportation.

**3. Should RSPA regulate only those hazardous materials shipments that are stored while under "active" shipping papers? If so, how should RSPA define "active" shipping papers?**

**Comment:** (1) Yes; active shipping paper. (2) The shipping paper in effect when the transportation vehicle has entered public roads or carrier track.

**4. Are there other factors for determining whether storage of hazardous materials is "incidental" to transportation in commerce?**

**Comment:** It is recognized that certain plant operations must occur in cognizance of the conditions allowed by DOT for transportation of a shipment -- use of properly designed and constructed container, appropriate marking, appropriate shipping papers, filling limitations, §173.24 concerns, etc., -- but which are at the time of execution outside the direct jurisdiction of DOT. This statement applies to loading operations preceding transportation just as much as it applies to in-transit storage.

### **Handling**

**1. Which transportation-related activities should be included under the term "handling"? Why?**

**Comment:** The way we understand "handling" is that it means the activities of conducting product transfer and storage, which are sufficiently covered by state regulations. We believe handling operations therefore should be excluded from DOT regulation, except for those handling operations that may be directly related to safety concerns relative to the transportation movement.

**2. Which transportation-related activities, if any, should be excluded from the list of activities that constitute "handling"? Why?**

**Comment:** Facility storage and product transfer operations, because they are adequately covered under existing state regulations.

**3. Are there factors for determining when a hazardous materials transportation activity is "handling" within the meaning of Federal hazmat law and, therefore, regulated under the HMR?**

**Comment:** Not to our knowledge. Besides, NPGA believes that the HMR should not have direct application over handling operations, though there are certain operations that must be properly done in order to comply with DOT requirements that will relate to the preparation and acceptability of a packaging for transportation under these Regulations.

### **Conclusion**

In addition to the uniformity accomplished under the DOT Hazardous Materials Regulations [through the adoption of these Regulations by the several states and consequent enforcement as state regulations], the state LP-gas safety regulations also are effectively uniform as they are all based on NFPA 58 **Storage and Handling of Liquefied Petroleum Gases**, published by the National Fire Protection Association, Quincy, Massachusetts. In its capacity as an American National Standard, NFPA 58 has been used as the basis of regulation by virtually all of the 50 states.

In addition, in some instances, various provisions of the Hazardous Material Regulations are cross referenced in the recommendations contained in NFPA 58. In other instances, provisions in this American National Standard have been adopted that are consistent in essential respects with related requirements in the Hazardous Materials Regulations. Thus, the propane industry enjoys a system of state and federal regulations that are remarkably consistent and uniform. This situation greatly facilitates compliance with both DOT and the relevant state regulations.

NPGA recognizes that as simple as "loading, unloading and in-transit storage" may appear on the surface, in reality, this topic is exceedingly complicated and that the extent and nature of the issues involved varies appreciably between industries. With propane's comparatively simple and straight-forward transportation and distribution system, the relevant issues are much easier to define, grasp and resolve, compared to the transportation and distribution of industrial chemicals, as an example.

Consequently, as DOT reviews the comments submitted in response to this ANPRM, NPGA earnestly encourages DOT to publish a second ANPRM refining the issues and acceptable (or alternative) solutions, for further review, discussion, consideration and comment. Such an approach would do much to build consensus between shippers and carrier alike and further simplify and facilitate ultimate publication of a Notice of Proposed Rulemaking addressing these issues and the adoption of such proposed regulations.

We would be glad to discuss the foregoing comments further at your convenience.

Sincerely,



W. H. Butterbaugh, CAE  
Director  
Regulatory Affairs

cc: D. N. Myers  
R. R. Roldan  
J. K. Burnham